Risking Precaution in two South Australian Serious Offender Initiatives

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Abstract

The serious offender is a crime management problem that involves multiple agencies in partnerships linked by common mandates and conventions regarding knowledge sources. Analysis of recent South Australian efforts to manage control of serious offenders for community protection finds common practices and principles at stake in these 'worthy targets'. Comparing 'anti-bikie' controls and control over the State's most prolific and dangerous offenders reveals a straightforward interpretation that they sideline adversarial justice. A more surprising revelation is their divergence in directing targeted people toward social inclusion.

The politics of worthy targets

Analyses of the intersection of politics and crime have rightly focused on the significance of selective exclusions as cultural and institutional forces push in the direction of a society of control, precautionary exclusion and surveillance (Garland 2001; Young 2000; Lyon 2001; Zedner 2007; Hebenton and Seddon 2009). Debate in recent years continues about the advent of measures and instruments that, either by design or convenience, provide authorities with novel means to manage criminal exclusions (Chesney and Goldsmith 2008; Ericson 2007; Newkirk 2010; Monahan and Palmer 2009). While public policy remains fractious or contentious, there has been — for the past three decades at least — a majoritarian position that supports a less rights-grounded and adversarial approach to the problem of harmful offending. In particular, policy-makers and practitioners have been persuaded to achieve what is commonly referred to as 'community protection' by using risk assessments and other instruments to pre-identify likely offenders (Walklate 2001:306). The combination of the proliferation of decision-making instruments that convert legal questions into risk measures and the common purpose in public policy to manage crime has contributed to producing a politics of worthy targets.

Risk management measures will justify exclusions where sufficient popular and institutional resources converge on a staple of crime policy: the worthy target (O'Malley 2004; Garland 2001; Rose 2000). Criminal justice is often realised and updated through popularised social angst that has layperson and expert alike identifying a category of event that may register as a moral panic (Hall et al 1978). Accordingly, a campaign of vilification

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will see demand and interest groups stipulate threat objects that are then synchronised to the drumbeat of bureaucratic and policy efficiencies. As a matter of strong political contestation, the worthy target will be a figuration visible and recognisable at a reasonably superficial threshold of public discourse (Adorno 1973). To turn this point a little, we might draw back and note that worthy targets derive from cross-sectional public support. They do not derive from whimsical social construction (Latour 2005) — they are not reducible to the floating disorder spectacle standing out against a majoritarian politics of fear (Mouffe 2006; Altheide 2003; de Lint 2008). On the contrary, they are where the currents of culture, politics and economic necessity happen to intersect, providing policymakers with a coherent and tangible entity, or a means of consolidating an expenditure of scarce valued common resources (Tilly 2004).

Under conditions of control, precautionary exclusion and surveillance, the mechanics of separating the vital from the viral involves a process whereby crimes are recast as risks, either as mitigated by straightforward exclusionary processes or, alternatively, that graduate inclusion based on needs (Bonta and Andrews 2007; Hannah-Moffat 2001). Separation is significantly dependent on the status of the object. Leading up to the confirmation of the criminal label by the court, the direction of distinction is towards affixing a stark and *unredeemable* reification; as if to say, 'these are the incorrigible' (Rose 2000; Young 2000; Martin, Gutman and Hutton 1988). However, once the individual *has* been bureaucratically, if not juridically, *identified* — for example, as a criminal paedophile — it is possible, if not necessary, to turn from risk to need and from incapacitation to restoration (eg Bonta and Andrews 2007). The instrument then may be inclusionary; it may perform therapeutic and rehabilitative functions, albeit to further the purview of the enforcement apparatus. This bi-directionality provides for a highly adaptable response to changeable policy cultures.

As demonstrated famously in Foucault's *Discipline and Punish* (1977), in the absence of a grand design, identitarian figurations (Adorno 1973) connect *across institutions*. Distinguishing (isolating and reintegrating) identities (worthy targets) is a matter of crime management that is increasingly accomplished by actors working in multi-agency 'fusions' (Monahan and Palmer 2009). Discrete criminal justice agencies (judiciary, police, corrections) collaborate with other governmental and non-governmental actors. Fusion centres and multi-agency partnerships allow agency actors to distinguish objects on common principles or currency, such as community protection through crime reduction or preventative control (Walklate 2001; Zedner 2007; Susskind 2006; Ericson 2007). They use these common principles in support of information sharing and decision-points to back a variety of interventions and operations (de Lint, Virta and Deukmedjian 2007; Monaghan and Walby 2011). This approach has been reinforced as governments have sought to redress inefficiencies attributed to compartmentalised briefs and inter-agency walls or silos.

In sum, objects and people are assessed and classified according to an evaluation of threat. Profiled identities or worthy targets comprise the product of consensus classifications in a consolidated inter-agency knowledge reliant on common decision-point 'fusions'. Assessment instruments cut through cohorts (Rose 2000)[1] and support the objective signification of identities along binaries (inclusionary/exclusionary). This process is undergirded by an ordering and layering of politics, one that places elite neo-liberal exemptions on top of common sovereign exceptions, to be sure, but one that must also register cross-sectional class and interest group values (Young 1986). The emphasis on

[1] The geopolitics includes spaces of frontier justice and 'blue zones' of trusted citizens, as per O'Donnell (1999).

'precautionary security' or 'community protection' is at the level of the common, or everyday (Harvey 1989; Hobsbawm 1994; Donzelot 2008).[2]

In two initiatives in South Australia (SA), we will find that the inclusionary/exclusionary cut (Rose 2000; Giddens 1991) draws upon this context of everyday exceptionalism, but does not lead in the same direction. The initiatives signify offenders against a common template of crime reduction; they rely upon extensive surveillance capacity, have the effect of reducing the purchase of rights in new categories of offenders, and foster more intensive cooperation between agencies. At the same time, they are distinguished by how they envision offender management. The first initiative, legislation aimed at outlawing associations between members of 'outlaw motorcycle clubs,' is exclusionary, it seeks to separate and isolate 'bikies' from communities in which they are embedded. The second initiative, the Offender Management Plan (OMP) pilot, is a multi-agency case-management initiative that deploys enforcement tools in an effort to interest police and other agencies in a coordinated or fused effort to *treat* and *re-embed* a target cohort. Supporting previous work (Kemshall and Wood 2007; Rose 2000; Ericson 2007; de Lint 2011), analysis of both initiatives suggests that there is, in the apparatus of justice and security, a 'calculated modulation' in the inflow and outflow of worthy targets.

Precautionary community protection

Consistent with practice in Canada, Great Britain, Italy, Austria, the Netherlands and the United States, Australia has introduced measures that support law enforcement to act against public disorder, organised crime, and serious repeat offending. In the past 15 years, policymakers have responded to concentrations of offending (Dawson and Cuppleditch 2007; Hebenton and Seddon 2009)[3] by focusing policy on a relatively small cohort of repeaters. In 2009, the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth) was introduced into Federal Parliament. The Commonwealth launched or extended legislation on confiscations of unexplained wealth (*Proceeds of Crime Act 2002* (Cth)), introduced a new joint commission offence into the *Criminal Code Act 1995* (Cth), extended the controlled operations, assumed identities and witness protection regime under the *Crimes Act 1914* (Cth), and expanded the telecommunication interception powers under the *Telecommunication (Interception and Access) Act 1979* (Cth).[4] At the State level, New South Wales (NSW) and SA have been lauded as 'models' (Law Council of Australia 2009:5) in developing legislation that seeks to institutionalise the judicial use of intelligence and the sharing of information across agencies.[5] Under then Premier Mike Rann, the SA State Government adopted a two-pronged approach to crime and marginality. It maintained a 'social inclusion' policy through its Social Inclusion Unit, which receives advice on social policy issues and forms an integrated approach to 'developing, implementing and reviewing the directions of Government to reduce social exclusion' (SA Attorney-General's

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2 Although, even recently, the idea of everyday exceptionalism might have appeared illiberal.

3 Research has suggested that a minority of offenders (as few as 10%) are responsible for as many as half of crimes committed (Dawson and Cuppleditch 2007:1).

4 It also follows anti-terrorism legislation that adopted the *International Convention for the Suppression of the Financing of Terrorism*, which revived a 'follow the money' approach to countering organised crime.

5 NSW passed the *Crime (Criminal Organisations Control) Act 2009* (NSW). The Act allowed criminal intelligence or secret evidence, and allowed judges to keep reasons for their decisions secret as well. While it was invalidated by the High Court in *Wainohu v New South Wales* for breaching the institutional integrity of the judiciary, revised legislation (the *Crimes (Criminal Organisations Control) Act 2012* (NSW)) requires the judge to give reasons where he or she 'makes a decision or refuses an application'.

Department 2011). At the same time, the SA Government also launched two initiatives as part of a 'tough-on-crime' policy. Both measures follow public unrest stoked by media blitzes covering episodic and persistent offending by members of rival 'bikie' gangs and similarly robust media coverage over the release of paedophiles and repeat violent and habitual property offenders with untreated addictions.[6]

Serious and Organised Crime (Control) Act 2008 (SA)

The *Australian Crime Commission Act 2002* (Cth) defines serious and organised crime as involving 'substantial planning, organisation, sophisticated methods and techniques by multiple offenders and including offences as diverse as tax evasion, money laundering, illegal drug dealing, violence, company violations and cybercrime.' In Australia, Outlaw Motorcycle Gangs (OMCGs) are among several serious and organised crime entities. There are an estimated 35 of these with 3500 full members comprising about 1% of the motorcycle club population (Australian Crime Commission 2009). The SA Police (SAPOL) made over 1000 'bikie arrests' in the past four years (Channel 7 2011; cf Dornin 2011).

With passage of the *Serious and Organised Crime (Control) Act 2008* (SA) ('SOCCA'), SA was the first of two Australian states to enact legislation to specifically 'target the direct movements and operations of serious and organised criminal groups' (SALRC 2011:6). SOCCA was precipitated, according to then SA Attorney-General, Michael Atkinson, by recent serious criminal offences, including murder, by 'outlaw motorcycle gang members,' and the contention that these persons 'commit a disproportionate number of serious crimes' (Atkinson 2007) and possess a 'structure and organisation' that 'do[es] not fit well into the usual concept of criminal liability' (SALRC 2011:11). Rann described the legislation as 'the world's toughest anti-bikie laws' (quoted in Bartels 2010:2).

Like anti-terrorism legislation and similar OMCG legislation elsewhere, SOCCA sought to create, by declaration of the Attorney-General on the basis of criminal intelligence received, a legal category of OMCGs. It did so by creating 'declared organisations' against whose members it required courts to issue 'control orders' that made members' criminally liable for meeting or communicating with one another. Section 14(1) of the legislation mandated the court to make a control order on application by the Commissioner of Police once the court was satisfied that a person was a member of a declared organisation. By virtue of s 35 of the Act, the law prohibited declared organisation members from 'criminal association' — deemed to be any contact by telephone, electronic communication or in person, of more than six occurrences during a period of 12 months. It allowed police to prohibit 'bikie members' from attending 'a place, event or area where this would pose a serious threat to the public.' The Act required the Attorney-General to publish notification of the declaration in the Government Gazette and a daily newspaper, but it did not require him or her to provide any grounds or reasons for the declaration decision or to provide to anyone the information on which the decision was based. Persons found guilty of violating control orders faced a maximum of five years' imprisonment.

In both NSW and SA, law bodies expressed 'shock' and 'serious concern' at the speed at which new measures against OMCGs passed through the state parliaments. There was much relief among these defenders of natural justice when, on 11 November 2010, the High Court of Australia held that SOCCA s 14(1) was constitutionally invalid (*South Australia v*

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6 See, for example, *The Advertiser* (Adelaide) 23 February 2009, 9 September 2009, 2 October 2010; *Adelaide Now* (online), 5 April 2009 <http://www.adelaidenow.com.au>.

Totani). It affirmed an earlier SA Supreme Court decision. The majority of the High Court considered that the provision authorised the executive to enlist the Magistrates Court in implementing decisions of the executive and that the manner in which that occurred was incompatible with the Magistrates Court's *institutional integrity* (High Court of Australia 2010). The taking away of rights and liberties and decisions regarding criminal liability are ordinarily within the domain of judicial power. The Court found that s 14(1) puts them in the domain of the Executive (High Court of Australia 2010:1). This ruling, which has come be referred to as the *Kable* principle (*Kable v Director of Public Prosecutions (DPP) (NSW)*), is based on chapter III, s 71 of the *Australian Constitution* (the *Commonwealth of Australia Constitution Act*), which confers federal jurisdiction on lower courts such as state courts and provides that the Commonwealth's judicial power is vested in the High Court of Australia 'and in such other courts as it invests with federal jurisdiction.' In addition, the High Court found that the requirement under s 10(1) of the legislation that required only the Attorney-General need be satisfied that 'a member or members of the organisation committed a criminal offence' in order to have grounds to make a declaration effectively obliged the Magistrates Court to impose 'serious restraints on a person's liberty whether or not that person had committed or was ever likely to commit a serious criminal offence' (High Court of Australia 2010:2).

In its invalidation of SOCCA and similar legislation from NSW, (the *Crimes (Criminal Organisations Control) Act 2009* (NSW) in *Wainohu v New South Wales*), the High Court would appear to have dealt a blow to intrusions into the institutional arena of the courts in general and the innovations in OMCGs in particular. However, the High Court did not deliberate on the constitutionality of serious and organised crime legislation, and has provided sufficient room with its judgment to accommodate much of what states have wished to legislate. We will examine the progress of the SA Government's counterattack after reviewing its other initiative.

The Offender Management Plan pilot

Following its own research on the concentration of crime in a relatively small group of 'prolific' offenders,[7] the Rann Government commissioned reports into the possibility of developing a targeted program. In 2009, agency heads from SA Attorney-General's Department (AGD), SA Police (SAPOL), Department for Correctional Services (DCS), Department of Health (DoH) and Department of Family and Community (DFC) created an Action Team of senior executives to develop an SA Offender Management Plan based on proposals submitted by DCS and SAPOL that were, in turn, based on UK models, including the Drug Interventions Program (DIP), the Multi-Agency Public Protection Arrangements (MAPPA) and the Prolific and other Priority Offender (PPO) Program.

As currently piloted in SA in the north and south of Adelaide, the Offender Management Plan (OMP) is an initiative 'to improve the wellbeing of the community by protecting them from serious crime' (SAPOL 2012:22). Commencing from June 2010, the OMP does not have a dedicated statutory basis and, in this respect, differs from the UK MAPPA and PPO programs.[8] It brings to bear on the case management of selected offenders, the collective

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7 In 2007/8, according to SAPOL, 17% of South Australian offenders in SA committed 42% of victim reported crime (SAPOL 2009:7)

8 As noted by Kemshall and Wood (2007) and Connelly and Williamson (2000), the MAPPA, is a 'community protection model'. MAPPA offenders (including sexual offenders and other offenders who 'pose a serious risk') are classified into three categories of intensive management: those requiring ordinary risk management

resources of: core partner agencies (including SAPOL, DCS, AGD, DoH — including Drug and Alcohol Services South Australia (DASSA), and Department of Community and Social Inclusion (DCSI) — including Housing SA and the Exceptional Needs Unit (ENU)); support partner agencies (SAPOL 2012:22); and other non-government and volunteer organisations, such as Offender Aid and Rehabilitation (OARS). OMP authority is extrapolated from a mosaic of legislation that empowers and restricts information collection and sharing in its linked agencies. In particular, it benefits from an exemption from the Information Privacy Principles (IPPs) of the SA Privacy Committee. Under this protocol, an 'exemption from compliance with IPPs 2, 8 and 10, allowing SAPOL, DCS, DCSI and Department of Further Education, Science and Technology (FEEST), to share case file information of serious offenders as part of the Offender Management Plan Pilot Program (Pilot Program)' is permitted:

> to allow the successful functioning of the Pilot Program in providing coordinated case management of selected serious offenders to reduce recidivism and promote community safety. This exemption also provides for the disclosure of relevant personal information to third party service providers necessary for the provision of targeted services to individual offenders under the Pilot Program. (Privacy Committee of South Australia 2010:42)

In its organisation and in its selection of offenders into the plan, the OMP uses a multi-agency and holistic approach. The OMP is divided, top to bottom, into three management tiers: a Strategic Oversight Committee (SOC) with general oversight of the program; Regional Panels (RP), which decide on entry and exit into the program; and Practitioners Forums (PF), which deliver the week-to-week case management and review offender progress. The OMP is led by a Coordinator who liaises with and problem solves between these three bodies, the involved agencies, and the wider community. Offenders nominated into the OMP will be on a sliding scale that will place them in one of two streams, where stream 1 is 'offender rehabilitation', for whom the focus is on case managing the offender by brokering services to address offender needs; and stream 2 is 'law enforcement', or offenders who may be non-compliant and who will receive intensive monitoring or targeting to limit opportunities for offending and to increase likelihood of apprehension (South Australia Government 2010). The categorisation of offenders is a matter of ongoing review, and is not a fixed designation. Offenders are also classified as 'Priority', serious violent or sex offenders who are assessed to present a significant risk to the community; and 'Prolific', a minority of the most active offenders often involved in acquisition crimes related to drug or gang involvement. Qualification is based on the assessment of risk to the community of criminal (including potential) behaviour, including to people and property. The OMP information/privacy provisions apply from the moment an OMP agency starts to action the nomination of an offender to the program, even if they are not ultimately selected. As noted, there is no statutory authority to mandate compulsory treatment. However, a lack of voluntariness and/or coercive obligations like a parole or probation or court order does not prevent an offender from being accepted into the OMP.[9]

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involving limited active participation outside of the responsible agency (level 1); those requiring more active involvement in multiple agencies in local agency risk management (level 2); and those 'critical few' requiring proactive management, by 'use of special resources including housing' (Kemshall and Wood 2007:8). MAPPA is the chief preserve of criminal justice actors (largely excluding the courts) and relies primarily upon risk assessment and management through multi-agency coordination of offenders. It uses control orders and surveillance and intelligence to exclude offenders from contact with vulnerable people and requires compulsory or compliant treatment. The model reconfigures the problem of criminal justice from a contest between due process versus crime control by creating 'community protection', rather than individual freedom or state authority as the primary value or good.

9 From information freely provided to the author from source documents not currently available for citation.

In crucial respects — similar to groundbreaking initiatives in the UK that have been combining program responsiveness to risk and needs-based response — the OMP develops deterrence strategies through sharing information and collaborating on case management. Established on the grounds that it will identify and manage selected offenders on the basis of community protection, OMP action is based on assessment that an offender's record of criminal behaviour is a key predictor of serious risk to the community.

Sourcing knowledge: Evidence, intelligence and assessment

Late in 2011, the South Australian Legislative Review Committee (SALRC) published a paper that is a revealing synopsis of the emergence of the concept of 'criminal intelligence' as a basis for 'administrative' decisions that are being mooted for criminal sanctions. It also provides insight into the 'normalisation' or extension of exceptional sovereign exclusionary practices or in the development of a *security enforcement apparatus*, in which multi-agency configurations or 'fusions' (Monahan and Palmer 2009) of practices are advanced.

The concept of criminal intelligence, according to SALRC, was created and introduced into the legislation to facilitate the protection of sources and methods that are arguably jeopardised by disclosure in open court. The SALRC document reviews how criminal intelligence was first introduced in 2003 to support decisions not to grant or extend firearms licenses where police had information regarding the involvement of the applicant in criminal organisations, but did not wish to make that information available for cross-examination by the applicant or his representatives on the basis that revealing this information would compromise or endanger investigations, police informants or police methods.

SA defines criminal intelligence as 'information relating to actual or suspected criminal activity the disclosure of which could reasonably be expected to prejudice criminal investigations, enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or endanger a person's life or physical safety' (SALRC 2011:22). Criminal intelligence is currently used in an administrative or civil capacity to refuse, revoke, or limit many 'privileges', including: possessing or holding a licence to keep a firearm; holding a liquor licence or gaming machine licence; the grant of a security agent's licence; holding a licence to sell or deal in prescribed hydroponic equipment; or working as a crowd controller at a licensed venue. It also may be used to refuse people the 'privilege' of creating or removing 'fortifications' and of 'being present' at the SkyCity Adelaide Casino or 'on licensed premises' (SALRC 2011:18).

It is the protection of criminal intelligence for criminal application — in the redrafting of SOCCA legislation — that appears to be the purpose of the 2011 SALRC document. Criminal intelligence is used in criminal legislation, specifically SOCCA s 21(1), which states that criminal intelligence is classified by the Commissioner of Police and 'must not be disclosed to any person except the Attorney-General, a person conducting a review of the legislation, and a person to whom the Commissioner authorises disclosure.' Although the courts are able to hear criminal intelligence provided that it is kept confidential and 'taken in the absence of the parties to the proceedings and their representatives' (SALRC 2011:33), as is made clear by the Attorney-General in the second reading speech, the intention of the Act is to limit the power of the Courts to 'go behind the declaration making process' (Moss 2010:11). The SALRC notes that criminal intelligence information is more expansive than public interest immunity because it is relied upon by the decision-maker (SALRC 2011:21).

The SALRC makes note of several submissions against the proposed application of criminal intelligence, including those of the Law Society of South Australia ('Law Society SA'), and Professor Roderic Broadhurst and Julie Ayling from the Centre of Excellence on Police Studies (CEPS). These submissions relied upon natural justice and its relevance especially, but not exclusively, in adjudication where a criminal penalty is attached, to find the proposed protection of criminal intelligence as offensive. Accordingly, barriers that preclude using intelligence as evidence include that intelligence is deployed by police at a less demanding standard than is evidence used in court.[10] In the submission from the Law Society SA (2011:1–2), the case was put starkly that expanding the use of criminal intelligence 'is fundamentally inconsistent with the concepts of the rule of law, a fair trial and open justice, transparency, accountability and integrity'. The SOCCA legislation undermines:

> The presumption of innocence, restricts or removes the right of silence, lacks proper procedural fairness, and removes access to the courts to challenge possibly biased, unfounded, or unreasonable decisions of the Attorney-General or Commissioner of Police. (Feary and Whitington 2008:1).

Broadhurst and Ayling noted that SOCCA 'tips this law into the terrain of inconsistency with established legal principles concerning fairness and equity before the courts' (CEPS 2011:5). Similarly, in his analysis of the distinction between intelligence and evidence, Roach (2010) notes that two principles at stake are the presumption of open courts and the need to treat the accused fairly, such that where innocence is at stake, there may always be an exception to non-disclosure, even where police informer privilege or public interest immunity is claimed.

SAPOL acknowledges that while there is a public interest in providing procedural fairness to applicants against whom criminal intelligence is used, this is only 'one facet of a larger public interest, namely ensuring the grant of licenses or authorities are appropriate.' In their view, community protection outweighs an individual's right to know all the information used against them in an application:

> I certainly accept, from a philosophical perspective, that certified criminal intelligence somewhat precludes an applicant from knowing what is being alleged against them in some cases. I guess, that is where the debate comes about what is for the greater good or for community safety. I would put it, from a police perspective that I think we need to consider this from a public safety, community safety perspective. (Harrison in SALRC 2011:65)

After considering the submissions from the Attorney-General, SAPOL, the Law Society SA, and others, the SALRC (2011:81) concluded that SOCCA and the use of criminal intelligence does indeed offend the natural justice requirement that a person 'has a right to the facts alleged against them.' However, it concluded that such provisions are 'warranted given the very serious risks posed to the community by the activities of outlaw motorcycle gangs and others involved in serious and organised criminal activity' (SALRC 2011:7). In addition, the SALRC noted the High Court's decision in *K-Generation v Liquor Licensing Court* 'approving' the definition and use of criminal intelligence.

The nub of the argument made to the SALRC by SAPOL representatives and the Attorney-General and also adopted by the SALRC is that criminal intelligence is sufficiently

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[10] The reason for this is that it does not need to pass through an open contest in which it is scrutinised by opposing parties, at least one of whom has an interest in falsifying that information: 'A court cannot really test the reliability of the criminal intelligence or even assess it properly without there being the other side, the adversarial process, coming into play, challenging it and testing it' (Law Society SA in SALRC 2011:76).

validated by police systems to perform as evidence on which judicial decisions may be based. In addition to the internal systems, the SALRC notes that criminal intelligence may be sourced interstate and is, therefore, vetted by other professional policing and security bodies. Third, SOCCA provides for an annual audit of the criminal intelligence decision-making by police by a District Court Judge, sufficient to allow for confidence in the information. Although there is no articulated claim that organised crime or serious offending is an existential threat of the strength of 11 September 2001 ('9/11') terrorism, it is proposed that the judiciary's interest in natural justice protection nevertheless needs to yield to the executive's interest in community safety or public protection. The proper role of the judiciary is to review, by way of annual audit rather than individual case, the overall adequacy of the internal checks that make criminal intelligence a reliable measure of criminal dangerousness. The SALRC notes the approving conclusions of two annual reviews of applications and declarations by Judge Moss that the criminal intelligence relied upon to support these instruments had ratings of at least C1, meaning that it comes from a 'fairly reliable' source, and that the information has been 'confirmed'.

On this last point, there is some debate. It has the independent reviewer taking on board the in-house assessments of reliability, a practice that begs the question of the status of uncertainty in intelligence evaluation. In a study recently conducted on Western Australia Police (WAPOL) (Joseph and Corkill 2011), it was noted that the systems in place fall short of a proper evaluation methodology. There are few formal information grading systems, and the most common by far is the Admiralty System, which uses a 6-by-6 alphanumeric grid and is adopted by Australian state police, including WAPOL and SAPOL. Information evaluation was assessed on the basis of appraising an item in terms of its credibility and 'the reliability of the source' (Joseph and Corkill 2011:99), and involves 'source capability, source history or performance, information origin, source motivation, bias, information credibility, and information pertinence' (Joseph and Corkill 2011:99, citing Corkill 2008). Flawed intelligence and an inability to speak authoritatively on the extent of the uncertainty of the product is the result of inadequate evaluation of the integrity of the sources and information. Like the WAPOL analysts Joseph and Corkill interviewed, several comments by SAPOL Assistant Commissioner Tony Harrison indicated confidence in the Admiralty System as a method of evaluation; however, it is not an evaluation methodology and provides false confidence when it is misapprehended as such (Joseph and Corkill 2011:101). In addition, Joseph and Corkill (2011:101) found contextual self-taught informal processes were predominantly used in the actual evaluation of information.

What knowledge and information systems are harnessed by precautionary instruments in the inclusionary objective behind the OMP? As noted above, the Coordinator may receive a recommendation for inclusion from any agency involved and then conducts a suitability assessment of the nominee to the program on the basis of the mandate of community protection. In his/her suitability assessment, the OMP Coordinator develops the nomination by reviewing criminal history and matters before the court, by requesting information on the candidate from all agency representatives, collating the returned information in a compilation report, and then sending the recommendation up to the Regional Panel for acceptance or rejection. The offender will then be intake assessed, he/she will be interviewed in an entry assessment process to help determine into what category he or she falls and the level of intervention and further information required. The OMP uses a risk assessment instrument — the Level of Service/ risk, need, responsivity (LS/RNR) — to provide an indication of background vulnerabilities — and a criminal history in a summary report and an evaluation of risks presented by the offender. This provides an assessment of: the offender's emotional and mental stability; their criminal or criminogenic associations;

domestic or familial relationships; drug and alcohol use; employment; academic or vocational skills development; housing and financial situation; and motivational attitudes. It allocates the offender in a needs score of low, moderate or high, and establishes the responsivity requirements of the various participating agencies in the treatment regimen. Where the risk of offending is especially high, law enforcement strategies provided by SAPOL may include, but are not limited to, disseminating intelligence about the offender on a need-to-know and case-by-case basis, where each case is determined on its own merits.[11]

The OMP assessment relies upon the LS/RNR developed by Andrews, Bonta and Wormith (2008) and available as a kit through the website of Psychological Assessments Australia. The LS/RNR, a fourth generation risk assessment tool (Bonta and Andrews 2007:3–4), is used for intake assessment because it is understood to capture specific risk/need factors. Against previous scholarly literature reporting a poor record of predicting future dangerousness, the belief has grown in the past two or three decades that assessment technology is sufficiently reliable to permit distinctions among individuals with different probabilities of reoffending. The LS/RNR is credited as being one of the most influential tools for offender assessment and rehabilitation (Ward, Mesler and Yates 2007). At its base, the LS/RNR model stipulates that criminal behaviour can be 'reliably predicted', treatment should 'focus on the higher risk offenders', that criminogenic needs are measurable, and that these should be the object of a treatment remedy tailored to the learning style of the subject. It incorporates 'assessment of a broader range of offender risk factors' with 'systematic intervention and monitoring' (Bonta and Andrews 2007:4) and applies a template of risk/need factors that have been identified as major predictors of criminal behaviour. It holds that cognitive social learning interventions are proven effective in teaching new behaviour, itself based on the principles that a positive collaborative relationship and good structuring of prosocial attributes is a necessary basis of responsivity.

A less supportive evaluation notes that evaluation of high-risk offenders on 'broad categorical grounds' is the 'mother of all uncertainties', as the scientific assessment of risk has been referred to (Hebenton and Seddon 2009:351). Accordingly, the prediction of relatively rare behaviour is more likely to be inaccurate because, while assessment accuracy is 'a function of the similarity of the assessed individual to the members of the reference group, … [t]he rarer the target behaviour within a particular population, the less accurate the tools will be' (Hebenton and Seddon 2009:352). Because LS/RNR and similar tools are predicated on a precautionary logic:

> False positives are part and parcel of being cautious in the face of uncertainty – erring on the 'safe side'. By contrast, false negatives (incorrectly rating a person as 'safe') cannot be tolerated because the consequence of this type of error for public safety and security are seen as potentially catastrophic. (Hebenton and Seddon 2009:352)

LS/RNR does provide a means of organising and differentiating the data, but the attributions or significance, let alone their reliability or validity, may benefit from independent scrutiny by further evaluation. Like the Admiralty intelligence scores, self-taught informal processes and craft experience continue to shape the decision-making of participating agency representatives. Human judgment backstops the expert assessments, providing directionality to decisions. This is reflected in audits of the MAPPA that highlight discretionary disclosure powers (Wood and Kemshall 2007:iii, 17) and in comments by interviewed OMP officials in an internal audit.[12]

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11 From information freely provided to the author from source documents not currently available for citation.

12 From information freely provided to the author from source documents not currently available for citation.

An analysis of the conflict between executive and judiciary in the OMCGs legislation reveals that the assertion of institutional separation is linked to the precedence of claimed values or principles in particular forms of knowledge production. The OMP builds on administrative practices that apply *graduated* subject restrictions on criminal and non-criminal citizen populations alike, on the view that research has shown that prevention is linked to a particular prophylactic tool. This leads us into the bigger questions that provide a context for these initiatives and pertain to the problem of what turns out to be the *exclusivity* of the OMP in the provision of public resources and of SOCCA in the provision of adversarial process.

'The first cut is the deepest' or 'maybe you haven't offended enough'

Rose (2000:324) has argued that what he refers to as 'contemporary control strategies' may be divided into those that 'regulate by enmeshing individuals within circuits of inclusion' and those that regulate by acting on 'circuits of exclusion'. In the former, there is a 'calculated modulation' by individualising surveillance by dispersed and open systems in which assessments extend from lifelong learning to risk management and the norms are 'designed in' (cf Ericson's counter-law 2: Ericson 2007). Identities under this system are securitised, where conditional access is based on the level of scrutiny to pass through the 'switch points' (Rose 2000:326). Included among exclusionary control are strategies 'which deem affiliation impossible for certain individuals and sectors and seek to manage these anti-citizens and marginal spaces through measures that neutralize the dangers they pose' (330), of which 'strategies for the preventative detention of incorrigible individuals such as paedophiles' (Rose 2000:330) is an example (Ericson's counter-law 1: Ericson 2007). For such persons new 'paralegal' forms of remedy include pre-emptive or preventative detention carried out 'not so much in the name of law and order, but in the name of the community that they threaten' (Rose 2000:324).

SOCCA and its anticipated successor legislation is exclusionary in two regards. First, it carries out the classic justice function of distinguishing persons as deserving of the criminal label and sanction; they are worthy targets reasonably separated from their freedoms. The labelling of OMCGs and members and the criminalisation of their associations is an outcome of a deliberative process of evaluation. The outcome is a hard line — the other side of which is the outlaw, the first move against whom is his consignment to the criminal category, an action that is the province of the police, who must carry out the role of dividing populations in the first instance. Crucially, they make the first cut deep enough to differentiate actors, to work up a distinction that might carry through the rest of the process.

Second, it establishes the epistemic basis for continuing interpretation. As noted by Ericson and Haggerty (1997:41, cited in Rose 2000:333), control is not merely about constraining the pathological among us, but also about the generation of 'knowledge that allows the selection of thresholds that define acceptable risks' and the generation of practices of exclusion based on that knowledge. As noted previously, separating the viral from the vital is a practice that is increasingly held to be a matter of 'administrative' decision-making, despite the objections raised that the consequences may be a criminal penalty.

As we have pointed out, the OMP and OMCGs initiatives deploy intelligence and risk assessment technologies, but they differ markedly in their object. Despite this, community protection or resilience is the primary goal. Intelligence and risk assessments are not exclusively exclusionary; as O'Malley (2004) has argued, they may perform to assist therapeutic and restorative practices. For offenders under the SOCCA initiative, the

assessments are used to declare a regime of deprivations or exclusions. Here, the legislation is criticised for being too inclusionary in developing worthy targets, or of targeting people who have not offended at all — a lack of offending by the individual not being sufficient cause for exclusion from the program, at least by the initial view of the SA Government. The exclusionary cut is too deep, the difficulty of cutting around the vitality of liberal freedoms in their negativity too great.

For offenders under the OMP regime, assessments are used to link treatment to risk and need, with the emphasis on integrating the offender into the community with matching services. Given the extra resources devoted to the case management of a handful of offenders under the OMP, it will not be surprising that the program will be sought after by offenders who, as per the offender matrix, are willing or compliant regarding rehabilitation. It may well be the case that the program will create positive interest among the qualified candidate pool,[13] given the short supply of housing and residential services, treatment program spaces, work support, and agency interest in offender success stories. To those not quite qualified through lack of sufficient priority or prolific offending, but keen on entering the program, the restrictiveness of entry may be encapsulated in the phrase 'but maybe you haven't offended enough.'

Indeed, as Young (2000) has written, the processes resorted to are *categorical exclusions* based on presumed connection of the individual to cohorts of race, region, colour, and signatures or profiles. A 'cordon sanitaire' — or the space between a diminishing 'central core' of secure and embedded full-time worker-citizens with career structures and an underclass 'outgroup'— is articulated with instruments of assessment, but will fail to hold. In a movement towards a 'dystopia of exclusion', the cordon cannot sanitise, cannot exclude crime and disorder, and fails to protect the privileged few from the permanently dispossessed. So, while the 'threshold is intolerant' and assimilation is no longer achievable or desirable given the lack of resources and a 'breakdown of hegemony', inter-agency assessments provide finer gradations of distinction for speedier and more effective though-puts.

The result may be more or *less* seamless. A startling illustration is provided by author Russell Banks, whose apartment in Miami Beach looks out on the Julia Tuttle Causeway, under which 'a colony' of convicted sex offenders (who had served their time) are living with 'the connivance of the local law authorities and parole officers' because with the 2500-foot restriction from where children may gather, there is no other place in Miami for them to live (Democracy Now! 2011). It is in this regard an added irony that SA offenders may be on the road to reintegration if they meet the risk threshold of the OMP by having offended enough.

Sidelining adversarial justice?

Client or subject compliance is a key determinant of greater or lesser processing by service agency officials in criminal justice, therapeutic, and security regimes. However, as examined extensively (Cicourel 1967), actors within these regimes may push different outcomes depending upon their institutional resources and sources of legitimacy. Thus,

[13] Regarding the Privacy Principle Protocols exemption, granted on the basis of the OMP's mandate of community protection, there is uncertainty on whether it may or ought to be extended to offenders who may be assessed as equally prolific or priority with regard to the OMP risk measures, but cannot be absorbed into the OMP due to a lack of resources, their residency, or other 'technical' disqualifying attributes.

'security' has been thought largely in terms of an existential contest, a precondition of law; it may be neatly understood as denoting the protection of the sovereign capacity to designate 'bare life' (eg Agamben 1998). The function of security intelligence is the maintenance of the political order (and, sometimes, simply the function of government) against threats to national, territorial, economic, ethnic, or uncertain values. It is because security embraces the protection of the sovereign that it sometimes subverts, even in internal affairs, the adversarial process, displacing it with inquisition. The primary means of security operations, consistent with the mandate, is the control of information that is actionable to politics. Officials are tasked to deploy intelligence in the countering of targets with resources that are open to discretionary implementation and subject to probabilistic calculation.

'Criminal justice', on the other hand, is dependent for meaning on the character of a transaction as a *normative* encounter; it must be alive to deprivations and predations as 'wrongs', the nature of the remedy for which defines just and legitimate governance. The core of justice is the integrity and viability of the individual vis-à-vis governance, which in the context of negative freedom is won in combat, figuratively and sometimes literally, with the will of state authority. The primary means of justice operations involves the retrospective balancing of individual goals and rights against legitimate common needs and goals in an open display of information allowing public reaction for or against the outcome.

A therapeutic regime, in further contrast, is an array or configuration of decision-points that presumes individuals who will be, to use Rose's (2000:234) words, enmeshed into 'circuits of inclusion'. Needs assessments are used to point the way toward self-reliance, or resilience, but it is understood that the business of the care professionals is to service client needs and, in total, to lend dignity to the whole person.

In the cross-fertilisation of criminal justice, security and therapeutic regimes, it would appear that traditional views of law and order in adversarial justice are sidelined. As explored by Ericson and Haggerty (1997), Ewald (2000), Hebenton and Seddon (2009), and O'Malley (2011), policy has absorbed the array of new logics and orderings via risk, precaution, and resilience. Precaution is one of several responses to the risk society and includes 'the deployment of imagination and its coupling with an assumption of harms that cannot be tolerated' (O'Malley 2011:7). As O'Malley (2011:8) notes, the assumption is that prevention is possible and the protection of a valued good is achievable by *selective removal of freedom*(s). According to Stern and Weiner (2006:394), the precautionary principle holds that:

> Uncertainty is no excuse for inaction against serious or irreversible risks, that absence of evidence of risk is not evidence of absence of risk, and that rather than waiting for evidence of harm to be demonstrated before acting, the burden of proof should be shifted to require sponsors of a risky product or activity to demonstrate that it is safe or else be subject to regulatory restriction or ban.

The rhetorical power of community prevention is tied to precaution, but also to other strategies or techniques that have been on the rise since the 1990s, including 'speculative pre-emption' and resilience (O'Malley 2011:8–11). As illustrated above in the quote from Stern and Weiner, neither precaution nor speculative pre-emption requires evidence of harm before requiring actors to mobilise their capacities. A reversal of the evidentiary burden is reflected in the doctrine famously articulated by Dick Cheney that a 1 per cent possibility of a danger or threat should be responded to as if it were a 100 per cent certainty (Susskind 2006). In addition, according to Stern and Weiner (2006:397), a strong reading requires that the burden of proof should not fall on governments to show that an activity is duly risky, but that 'those subject to the policy … show that their activities are not unduly risky' (Stern and Weiner 2006:397). In this and other ways, we find the presupposition that security trumps

justice and individual freedoms of some, that individual life may be sacrificed for the vitality of a version of the collective good.

As we have seen, this is interpreted and objected to in briefing papers by law societies championing natural justice to various legislative committees as a radical reversal of onus. As per Gray (2009:290) and noted earlier, SOCCA offended institutional independence (as per the *Kable* principle)[14] and due process and natural justice, particularly freedom of association, political communication, and the right to fair challenge sufficiently to invalidate much of the NSW and SA control order regimes. That said, new legislation in both states is seeking to normalise criminal intelligence. And in the phrase 'law bent against legality', or natural justice, is the kernel of the opposite idea that law is not situated with legality in the first instance (McBarnet 1979). In the attempt to identify a strong cultural value (the right to contest one's accusers) with an institutional legacy (independent judicial fact-finding) the judiciary makes a strong claim about the situatedness of the law that resonates with liberal democratic traditions. The fact remains that law *emerges* bent, and is bent routinely from legality. Therefore, it is unsurprising that those asking for such bending are not too fussed at having the action characterised as such at the same time as they stipulate alternative values of community safety and precaution.

In substituting precautionary community safety for something akin to executive necessity there is, of course, a wish to drive the discourse away from individual rights versus public authority: the terms 'precaution' and 'community' is persuasive in overcoming negative freedom and the binary of the adversarial. But there is more than this: there is in the innovation of these practices more than a normalisation of a security enforcement apparatus and its package of instruments that cut around the vitality of negative liberal freedoms; there is popular dissatisfaction that adversarial criminal process achieves just outcomes and processes, and that it matches values and principles to our uncertain times.

Discussion: Fusion politics and hazards

The regular interaction of security, justice and therapeutic actors draws the sub-systems of criminal justice into an emergent configuration. That product, whether termed 'apparatus', 'field' or merely 'integration' is multi-lateral and multi-sectoral (Johnston 1992). In it, justice principles and security practices and methods are revaluated in a 'mission adaptation' (Deukmedjian and de Lint 2007) or convergence (Chesney and Goldsmith 2008).

In the blending and blurring of demarcations between risk and crime, security and criminal justice, and anticipatory and reactive responses to perceived disorder, there also emerges a *politics of fusion*. In a politics of fusion multi-agency partnerships and criminal intelligence are powerful forces of knowledge production that are designed to respond to worthy targets that have been identified by precaution as expressed in community protection initiatives. Arrayed in a politics of fusion, actors note, transport (Newkirk 2010; Latour 2005) and generally incorporate the knowledge instruments, objects, or facts into their terms of reference. Multi-agency partnerships and criminal intelligence produce these new objects and subjects - facts on the ground - that must be accounted for where the rules of play are made up or revisited by judicial decision-makers.

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[14] 'Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth': *Kable* at 103 (Gaudron J).

What is the character of the apparatus and its relations? There is much concern that security will be the overarching regime and will trump justice and welfare in a process known as securitisation or 'security creep.'[15] In this process, natural justice is questioned and *defined down* as multi-agency partnerships and criminal intelligence produce new objects and subjects — facts on the ground — that must be accounted for where the rules of play are renewed or revisited by judicial decision-makers. Some of the included practices — including categorical suspicion, verification by closed tribunals, data mining, and cohort targeting (Monaghan and Walby 2011; Newkirk 2010; Walby and Monaghan 2010; Stern and Weiner 2006) — are identified with anti-liberal or authoritarian regimes.

Fusion politics does afford this, certainly, but as security enmeshes with criminal justice and therapeutic regimes through multi-agency linkages, unexpected and favourable results are also produced. As personnel are circulated in an expanding array of linked authorities in these justice fusions, the lines of demarcation are permeable beyond the legalese, paper trails and silos. They also prevent the passing off of difficult or problem cases in the hope to disappear them for good. They can produce a more nuanced understanding of the target, so that 'target' must be seen not only as offender, but as case-managed client whose problems are not only a matter of lateral thinking, but which have a history and future. In the meantime, it is on its face sensible that an ordering principle (precaution, pre-emption) will adapt standards of justice to standards of security. Orderings (inclusions and exclusions) are inevitable and they must be sufficiently adaptable to changing figurations of justice, perhaps even overcoming the traditional balancing act between the so-called formal equivalents of due process and crime control (Packer 1968). The functional consolidation of multi-agency delivery and the sourcing of knowledge around the core of criminal intelligence have the potential to produce an effective managerial response to the longstanding problem of order.

This is not to underestimate that a politics of fusion carries potential hazards.[16] The first is the policy narrowing impact of 'net-widening' (Cohen 1985). Fusions are force multipliers that express on a deliberately confined version or narrow interpretation of a target as a matter of concern. They produce an apparatus that may *overshadow* competing efforts by yet *other institutions* to marshal scarce public resources in the shaping of public policy and social problems (Simon 1997). Traces of this are observable in the fusion politics that will likely arise around the OMP. Spearheaded by police and corrections in the objective of community protection, the OMP in fact offers a mechanism for treatment and rehabilitation that straightforward care provisions *as run by welfare agencies* may not be funded or politicised to grant. In some jurisdictions, a security enforcement apparatus has come to occupy the largest political constituency and is equipped to address almost any social or political matter of concern.

A second hazard is the impact of a loss of public confidence in justice and security that may stem from overreach of a security enforcement apparatus, resulting in a justice and/or security *gap*. As summarised by JUSTIS (2009:2), 'an effective justice system must assess itself not only against the narrow criteria of crime control, but against broader criteria

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[15] This refers to a breakdown in the line between risk and crime, terrorism and conventional crime, and probable and possible events (Murphy and McKenna 2007: 27; Zedner 2007; de Lint 2008). As noted by Murphy and McKenna (2007:27), pushing law enforcement to more anticipatory, proactive and preventive actions and adding (national) security conventions to police responsibilities encourages the blurring of internal and external boundaries.

[16] The hazards attendant the combination or separation begin to be found in the source of the mandate (crime-based, or pertaining to the possible application of criminal law); the means of carrying it out (the warrant, the collection of evidence, the powers of search and arrest for prosecutions); and the control or checks on it (adversarial challenge and independent adjudication in court through judicial scrutiny).

relating to people's trust in justice and their sense of security'. As noted in *Kable* (Gaudron J at 122), a lack of sufficient institutional autonomy may undermine public confidence in public law. And where institutional checks and oversights are information starved and given narrow terms, even an occasional transparency spectacle of a commission of inquiry will struggle to overcome the gulf between government practice and public confidence.[17] Overreach may mean that the undergirding liberal democratic instruments fall into a parlous disarray. When that occurs, justice and security as a meta-frame for governmental action and in dedicated institutions specifically, lose discrete functionality in maintaining social and political order. They also stimulate bold resistance.[18]

These are not intended as a full account of all that challenges the greater integration in justice, security, and welfare in this and perhaps other sites of intervention. But it does suggest that such integration impacts on three broad areas: social and political values (including sovereignty); scale or relative technical capacity; and public confidence in the combined and separate functions of justice and security. The opposing claim of authoritarian imposition and liberal freedom produces contradictory policy outcomes.[19] Precious and precarious freedoms are brandished by in-groups *and* out-groups. The policy questions that stem from this and animate much current and future work are: How might the down- or up-scaling of capacity be made to meet (redefined) public interest needs? How might instruments of check and review be refurbished to meet the challenges of a more integrated security/welfare field? According to which ordering regimes might the security enforcement apparatus be refreshed?

Cases

Kable v Director of Public Prosecutions (DPP) (NSW) (1996) 189 CLR 51

K-Generation Pty Limited v Liquor Licensing Court (2009) 237 CLR 501

South Australia v Totani (2010) 242 CLR 1

Wainohu v New South Wales (2011) 243 CLR 181

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17 This is very much a consequence of institutional phenomena, including the filtering of expert opinion, the cultivation of media sources, and the circulation of elite opinion across various key posts. It is also aided by information control: the complexity and volume of information can render the oversight function more susceptible to agency capture and oversight overload, especially given the necessary cross-fertilisation of officials between the review function, the agency leadership function and partisan political commitments. The non-disclosure of information classified by foreign agencies, as well as other non-disclosure practices, including those that derive from caveats, memoranda of understanding, proprietary corporate information, and confidentiality agreements, limits common knowledge about the work of the security enforcement apparatus, even after major reviews or public inquiries. The check on expertise is, in this context, a herculean task.

18 Resistance to OMCG legislation is already being consolidated in a new corporate entity. In April 2009, eight OMCGs formed the United Motorcycle Council of NSW with the intent of launching joint action to challenge legislation that threatens the legal principle of 'freedom to associate' (Bartels 2010:5).

19 To this end, as O'Malley (2011) has argued, neo-conservatives such as Charles Murray (Murray 1994) have valorised 'social and prudential authoritarianism'. But neo-liberal doctrines following the Reagan and Thatcher years have also supported 'a more radically laissez-faire "social" entrepreneurialism' (O'Malley 2011:9). Donzelot (2008) points out that neo-liberal policy preserves a locus of freedom, buttressed by deregulation, to stimulate entrepreneurial activity in all its *necessary* uncertainty, often by reference to negative freedoms, or privacy and other rights.

Legislation

Australian Constitution

Australian Crime Commission Act 2002 (Cth)

Crimes Act 1914 (Cth)

Crimes (Criminal Organisations Control) Act 2009 (NSW)

Crimes (Criminal Organisations Control) Act 2012 (NSW)

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth)

Criminal Code Act 1995 (Cth)

Proceeds of Crime Act 2002 (Cth)

Serious and Organised Crime (Control) Act 2008 (SA)

Telecommunication (Interception and Access) Act 1979 (Cth)

Conventions

International Convention for the Suppression of the Financing of Terrorism, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002)

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